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## United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

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## Memorandum

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Subject: Implementation Actions During Land Use Planning

## Issue

You have asked if the National Environmental Policy Act (NEPA) regulations promulgated by the Council on Environmental Quality (CEQ) at 40 CFR §1506.1 require BLM to defer or deny a proposed action, which is not inconsistent with an existing land use plan, during a plan amendment or revision process when the action will not preserve all of the alternatives BLM is considering in the plan amendment and accompanying EIS. This question arises from the situation described in the Land Use Planning Handbook, BLM Handbook H-1601-1 (Nov. 22, 2000), paragraph VII. E. The relevant provision reads:

E. Status of existing decisions during the amendment or revision process.

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During the amendment or revision process, the BLM should review all proposed implementation actions [under the existing plan] through the NEPA process to determine whether approval... would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined . . . . Subject to valid existing rights, proposed actions that cannot be modified to preserve opportunities for selection of any of the reasonable alternatives should be postponed or denied. (See 40 CFR 1506.1)

We conclude that, while postponement to preserve alternatives may be desirable in some cases, NEPA does not compel an agency to postpone taking implementation actions which are not inconsistent with the existing land use plan and supported by adequate NEPA documentation. We reach the same conclusion whether we analyze plan EISs as outside the scope of 40 CFR §1506.1(c), which is concerned only with actions during preparation of "program statements," or whether we rely on the exception in that regulation for "actions covered by an existing" EIS of such breadth. In fact, section 302(a) of the Federal Land Policy and Management Act (FLPMA), requires that BLM manage the public lands "in accordance with the land use plans developed by [it]." 43 U.S.C. 1732(a).

## Discussion

The Land Use Planning Handbook, quoted above, refers to 40 CFR §1506.1 ("Limitations on actions during the NEPA process"). The only provisions of §1506.1 that could bear on this question are subsections (a) and (c).

Subsection (a) of 40 CFR §1506.1 addresses implementation of elements of an action under analysis in an EIS.<sup>1</sup> Subsection (a) prohibits an agency from taking any action that would adversely impact the environment before the NEPA analysis and record of decision covering the proposed action is final and formally adopted. We are examining a different question. It involves BLM's discretion to take an action that implements an existing land use plan (such as a resource management plan or "RMP") during the planning and NEPA processes that may amend or revise the existing land use plan based on the analysis in a new or supplemental plan EIS.

Subsection (c) of 40 CFR §1506.1 addresses an agency's ability to take actions when the agency is working on a "required program environmental impact statement." Subsection (c) provides:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

It is unclear whether an RMP/EIS is a program statement within the scope of this regulation. This prohibition only applies where a "program statement" is "required." Several provisions of the CEQ regulations indicate that program statements are but one of several types of environmental impact statements. In addition to project-specific actions, statements may be

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<sup>1</sup> 40 CFR 1506.1(a) provides:

Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives. (emphasis added)

required for several types of broad proposals or actions: program, policy, and plan. See 40 CFR §1508.18(b). See also 40 CFR §§1500.4 and 1508.28. According to the regulations, a federal action will tend to fall into one of these categories. The regulations describe a program action as the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 CFR §1508.18(b)(3). The Secretarial Decision for the federal coal program, pursuant to the Federal Coal Leasing Amendments Act and the Surface Mining Coal Reclamation Act, was a program action. In contrast to a program action, a planning action involves "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based." 40 CFR §1508.18(b)(2). A program statement thus would be one addressing the implementation of a specific plan or policy, such as a statute or executive directive, while plans provide for the coordination of many resource use programs within a specific agency or (in the case of land use plans) geographic areas. Since subsection (c) only applies to "program statements," one could argue that it does not apply to an RMP/EIS, if an RMP action is seen as a planning action rather than the implementation of a program.

However, one reaches the same conclusion if one treats §1506.1 as applicable to a plan EIS, blurring any distinction between "program statements" and environmental impact statements for formal plans (such as land use plans) or agency policies (such as regulations). By its own terms, subsection (c) does not limit agency decisionmaking with respect to actions "covered by an existing program statement." Subsection (c) permits an agency to take implementation actions covered by an existing programmatic EIS during work on a new programmatic EIS, even if the action would limit the range of alternatives in the new "program statement."

In ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998), plaintiffs requested that BLM impose a moratorium on certain actions during preparation of the "Eastside Management Plan," which would result in the revision of three existing RMPs. BLM responded that it would continue to take actions under existing program statements in reliance on the exception in 40 CFR §1506.1(c) for "existing program statements." The United States Court of Appeals for the Ninth Circuit upheld the BLM position, stating that plaintiffs failed to show any clear duty under NEPA or FLPMA with which BLM must comply. The court dismissed as unfounded the argument that an outdated RMP/EIS cannot serve as the "existing program statement" referenced in §1506.1(c), stating that "it is reasonable to conclude that the RMPs are existing program statements for purposes of NEPA. The fact that revisions of the RMPs are not necessarily current does not change this result." 50 F.3d at 1140. The court also concluded there was no provision in FLPMA or its regulations "that would require BLM to cease actions during the revision process." Id.

In Western Land Exchange Project v. Dombeck, 47 F. Supp.2d 1196 (D. Ore. 1999), plaintiffs contended the CEQ regulations prohibited the Forest Service from proceeding with a land exchange pending completion of the Eastside and Upper Columbia River Basin EIS. Relying on the analysis in ONRC Action, the court upheld the land exchange, reasoning that: "[T]he land

exchange in the case before us is being conducted pursuant to the Forest Plans of the three National Forests involved in the proposed exchange. Each of these three National Forests has its 'existing program statement'. . . . The exception in 40 CFR 1506.1(c) applies to the facts in this case." 47 F. Supp.2d at 1213. In addition, the court noted the land exchange itself was accompanied by an adequate EIS. See also In re Bryant Eagle Timber Sale, 133 IBLA 25 (1995) (denied claim that BLM violated 40 CFR §1506.1(a) and (c)). Thus, even if a plan EIS is treated as if it were a "program statement" covered by §1506.1(c), implementation actions under existing plans would not be limited by that regulation because of the exception for actions "covered by an existing program statement," inasmuch as all actions authorized by such plans have been covered by previous programmatic EISs.

It is important to recognize that the limited applicability of section 1506.1 does not relieve BLM from the need to evaluate and document plan conformity and the adequacy of NEPA analysis in support of the proposed action. For example, in Upper Floras Timber Sale, the decision to approve a timber sale was vacated pending the preparation of a supplemental EIS and plan amendment, where the "plan being implemented can no longer be fairly said to encompass the same plan described in the EIS," and "the increase in the acreage designated for clearcutting" goes beyond what might be treated as "merely a fine-tuning adjustment" to the program envisaged by the original EIS. 86 IBLA 296 (1985). See 40 CFR §1502.9 concerning the circumstances in which additional NEPA work may be required. Provided that the action conforms to the RMP, BLM may choose to carry out any necessary NEPA supplementation of the existing plan EIS as BLM performs NEPA analysis of the site-specific proposal.

### **Conclusion**

Nothing in the CEQ NEPA regulations require postponing or denying a proposed action covered by the EIS for the existing land use plan to preserve alternatives during the course of preparing a new land use plan and EIS. Of course, BLM must undertake appropriate NEPA analysis of the site specific action being proposed under the existing land use plan.